

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0910**

In re the Matter of: Mikayla Lee Swanson,
and on Behalf of Minor Children, petitioner,
Respondent,

vs.

Edward Wayne Swanson,
Appellant.

**Filed March 14, 2022
Reversed and remanded
Johnson, Judge**

Hennepin County District Court
File No. 27-DA-FA-21-2597

Mikayla Lee Swanson, Maple Plain, Minnesota (*pro se* respondent)

John G. Westrick, Savage Westrick, P.L.L.P., Bloomington, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Kirk,
Judge.*

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Mikayla Lee Swanson petitioned the district court for an order for protection against her former husband, Edward Wayne Swanson. The district court granted the petition and

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

issued an order for protection. We conclude that the district court erred by admitting and relying on inadmissible hearsay evidence. Therefore, we reverse and remand.

FACTS

Mikayla and Edward were married in 2014. They separated in September 2019, and their marriage was dissolved in June 2020. They have two minor children, who now are five and six years old. Mikayla has joint legal and sole physical custody of the children, and Edward has joint legal custody and parenting time on alternating weekends.

In May 2021, Mikayla petitioned the district court for an order for protection (OFP) on behalf of herself and the two minor children. In her petition, Mikayla alleged, among other things, that her then-five-year-old son had told her that Edward had told him that Edward was going to shoot Mikayla and her boyfriend. Mikayla also alleged that Edward owns and possesses firearms. Mikayla further alleged that, when they were married, Edward “was very controlling, emotionally and verbally abusive, and he acted in a very scary and aggressive manner on several occasions.” She alleged that, on one occasion in 2019, Edward punched a hole in a door near where Mikayla had been standing, which, she alleged, caused her to fear physical harm.

Three days later, the district court issued a temporary *ex parte* OFP and scheduled an evidentiary hearing, which later was continued. Shortly before the evidentiary hearing, Edward filed a motion *in limine* in which he sought, among other things, a ruling prohibiting testimony about out-of-court statements of the parties’ minor children.

The district court conducted an evidentiary hearing in July 2021. Both parties were represented by counsel. At the outset of the hearing, the district court considered Edward’s

motion *in limine*. Mikayla's attorney asserted that testimony about out-of-court statements by the children would *not* be offered for the truth of the matter asserted—*i.e.*, “not for the purpose of proving that Mr. Swanson said the things that the children say he said”—but only to show Mikayla's state of mind and to explain the timing of her filing of the petition. The district court deferred ruling on the motion.

Mikayla testified first. She began by stating that she no longer was seeking an OFP on behalf of the minor children. She testified that, during her marriage to Edward, he frequently was controlling and verbally abusive. She also testified that Edward sometimes was physically aggressive, and she described the incident in 2019 when he punched a hole in a door near where she was standing.

On direct examination, Mikayla's attorney asked her a question that referred to the parties' son's statements to Mikayla that Edward said that he was going to shoot Mikayla and her boyfriend. Edward's attorney objected on hearsay grounds. The district court overruled the objection. Mikayla answered the question by describing several such statements by her son between March 2021 and May 2021. Mikayla testified that her son's statements made her feel afraid and prompted her to call a domestic-abuse hotline and file the OFP petition. Mikayla explained that she was concerned because she knew that Edward owned and carried firearms.

Mikayla called one other witness: her mother, who testified that she had heard Edward call Mikayla names and had seen him be controlling at social events. Mikayla's mother also testified that she twice had stated to medical professionals that she believed that Mikayla was being abused.

Edward also testified. He denied ever injuring or threatening to injure Mikayla. He responded to Mikayla's testimony about the door incident by testifying that he did not intend to punch a hole in the door but that his hand went through the door when Mikayla forcefully closed it on him.

At the conclusion of the evidentiary hearing, the district court made an oral finding that Edward had engaged in domestic abuse. The district court stated that Mikayla's testimony was "very credible" and that Edward's testimony was "slightly less credible." The district court also stated: "I do believe that there were more than one instances in which [the parties' son] was told by his father that he would shoot his mother. I do find that to be concerning and a basis for issuing this order for protection." The district court elaborated by stating: "[A] threat . . . was made more than once through the children in a situation where there has been past abuse, verbal, physical and repeated abuse. That's why I'm ordering the order for protection today."

Immediately following the hearing, the district court extended the temporary *ex parte* OFP to allow time for the parties to discuss and agree on a means by which the parties could facilitate Edward's exercise of parenting time. On the day following the evidentiary hearing, the district court filed an OFP in which it found that Edward punched a hole in a door while Mikayla was standing in front of it. The district court also found that the parties' minor children told Mikayla that Edward "was making threats against her" and that the parties' son had told her that Edward "threatened to shoot both her and her current boyfriend." The district court made an ultimate finding that Edward engaged in domestic abuse toward Mikayla. The district court ordered Edward to not have any contact with

Mikayla, with no exceptions. The OFP also prohibits Edward from being at or near Mikayla's residence, requires him to participate in domestic-violence programming as deemed necessary by court staff, requires him to submit to a chemical-dependency evaluation, and results in his being prohibited by law from possessing firearms. The district court stated that the OFP will be in effect for two years from the date of the temporary *ex parte* OFP.

Shortly after the OFP was issued, the parties jointly requested that the district court amend the order to allow them to communicate about the children in limited ways via the Our Family Wizard co-parenting communication website. The district court then filed an amended OFP that allows Edward to contact Mikayla via Our Family Wizard "regarding necessary legal custody decisions; parenting time arrangements, including vacation requests; and any out-of-pocket medical or dental reimbursement requests."

Edward appeals.

DECISION

Edward argues that the district court erred by admitting three types of inadmissible evidence. Specifically, he contends that the district court erred by admitting (1) inadmissible hearsay evidence concerning the parties' son's out-of-court statements that Edward said that he was going to shoot Mikayla and her boyfriend; (2) testimony of Mikayla's mother that was beyond the scope of the issues raised by Mikayla's petition; and (3) testimony of Mikayla about matters not alleged in her petition. We begin by considering Edward's first argument.

The Minnesota Domestic Abuse Act authorizes a district court to issue an OFP to protect victims of domestic abuse. *See generally* Minn. Stat. § 518B.01 (2020). To obtain an OFP, a petitioner must prove by a preponderance of the evidence that the respondent has committed domestic abuse “against a family or household member.” *Id.*, subd. 2(a); *Oberg v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015). The term “domestic abuse” is defined by statute to mean “(1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats . . . ; criminal sexual conduct . . . ; or interference with an emergency call” Minn. Stat. § 518B.01, subd. 2(a).

The rules of evidence apply in an evidentiary hearing on a petition for an OFP. Minn. R. Evid. 1101(a), (b); *Olson ex. rel. A.C.O. v. Olson*, 892 N.W.2d 837, 841 (Minn. App. 2017). Under the rules of evidence, hearsay evidence is inadmissible as substantive evidence unless a hearsay exception applies. Minn. R. Evid. 802; *State v. Greenleaf*, 591 N.W.2d 488, 502 (Minn. 1999). Hearsay evidence is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). But an out-of-court statement that is *not* offered for the truth of the matter asserted, such as a statement introduced to show its effect on the state of mind of another person, is not hearsay and may be considered by the factfinder for the purpose for which it is offered. *See State v. Sillday*, 646 N.W.2d 557, 563-64 (Minn. App. 2002), *rev. denied* (Minn. Aug. 20, 2002). This court applies an abuse-of-discretion standard of review to a district court’s ruling on a hearsay objection. *Olson*, 892 N.W.2d at 841.

In this case, the district court overruled Edward's objection to Mikayla's testimony about the parties' son's out-of-court statements based on Mikayla's attorney's statement that it was not being offered to prove "that Mr. Swanson said the things that the children say he said." Accordingly, Mikayla's testimony about the son's out-of-court statements was inadmissible for that purpose but was admissible to prove Mikayla's state of mind. *See Sillday*, 646 N.W.2d at 563-64; *GN Danavox, Inc. v. Starkey Laboratories, Inc.*, 476 N.W.2d 172, 176 (Minn. App. 1991), *rev. denied* (Minn. Dec. 13, 1991); *State v. Amos*, 347 N.W.2d 498, 502 (Minn. 1984).

However, the district court did not consider and use Mikayla's testimony about the parties' son's out-of-court statements for the limited purpose for which it was offered. Rather, the district court considered and used the evidence as substantive evidence supporting a finding that Edward had told the son that he was going to shoot Mikayla and her boyfriend. Furthermore, the district court relied on that finding when it made the ultimate finding that Edward engaged in domestic abuse toward Mikayla. This is apparent not only from the amended OFP itself but also from the district court's statements at the conclusion of the evidentiary hearing. The district court stated that it "believe[d] that there were more than one instances in which [the parties' son] was told by his father that he would shoot his mother" and that the district court found that conduct "to be concerning and a basis for issuing this order for protection." Mikayla does not argue on appeal that any hearsay exception applies to either Edward's or the son's out-of-court statements. Thus, the district court erred by admitting and relying on inadmissible hearsay evidence.

See Olson, 892 N.W.2d at 841-42 (concluding that district court erred by admitting and relying on inadmissible hearsay evidence in issuing OFP).

We are mindful that a district court's erroneous ruling on the admissibility of evidence may be a harmless error. *See* Minn. R. Civ. P. 61. In another case concerning the erroneous admission of hearsay evidence in an OFP proceeding, this court described the harmless-error rule by stating that an appellant "bears the burden of demonstrating that an evidentiary error resulted in prejudice" and that an erroneous evidentiary ruling is prejudicial "if it might reasonably have influenced the fact-finder and changed the result of the proceeding." *Olson*, 892 N.W.2d at 842. We concluded in that case that the erroneous admission of hearsay evidence was not harmless because the district court's finding of domestic abuse necessarily depended on the inadmissible hearsay evidence, which meant that "the evidentiary error of considering these statements changed the outcome of the hearing and prejudiced appellant." *Id.*

Similarly, in this case, the district court's finding of domestic abuse and issuance of the OFP and the amended OFP were based on and influenced by the inadmissible hearsay evidence. The district court said as much at the conclusion of the hearing when it referred to the hearsay evidence that Edward told the parties' son that he was going to shoot Mikayla and her boyfriend and then stated, "That's why I'm ordering the order for protection today." Thus, the district court's error is not a harmless error.

In sum, the district court erred by admitting and relying on inadmissible hearsay evidence, and the error is not harmless. Because Edward is entitled to appellate relief on his first argument, we need not consider his second and third arguments.

Therefore, we reverse the district court's issuance of the amended OFP and remand the matter to the district court for further proceedings not inconsistent with this opinion. The amended OFP shall remain in effect until the clerk of appellate courts enters judgment. Upon entry of judgment by the clerk of appellate courts, the temporary *ex parte* OFP shall be deemed reinstated to the extent that it protects Mikayla (but not the children, who are not protected by the amended OFP), except that the temporary *ex parte* OFP shall be qualified by the agreed-upon method of communication concerning the children that is described in paragraph 3.a. of the amended OFP. We note that Mikayla requested relief that requires a hearing, *see* Minn. Stat. § 518B.01, subd. 7(e), and that Edward requested an evidentiary hearing, *see id.*, subd. 5(d). The district court shall conduct a hearing on the petition within ten days of the date on which the clerk of appellate courts enters judgment. *See id.* The temporary *ex parte* OFP, as modified herein, shall be effective for ten days after the clerk of appellate courts enters judgment or until modified or vacated by the district court pursuant to a hearing. *See id.*, subd. 7(c).

Reversed and remanded.

A handwritten signature in black ink, appearing to read "Matthew Johnson". The signature is written in a cursive, flowing style with a large initial "M" and a long, sweeping underline.